

CERTIFIED FOR PARTIAL PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ADDISON CISSNA,

Defendant and Appellant.

D053464

(Super. Ct. No. SCD204169)

ORDER MODIFYING OPINION,
CHANGING PUBLICATION
STATUS AND DENYING
REQUEST FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

The request for rehearing is denied.

The opinion filed February 26, 2010, is modified as follows:

1. On page 1 of the opinion, the word "PARTIAL" is added in the heading "CERTIFIED FOR PUBLICATION" between the words "FOR" and "PUBLICATION."
2. On page 1 of the opinion an asterisk is added after the word "PUBLICATION" in the heading, indicating the following footnote, which is added: *This opinion is certified for partial publication with the exception of parts II (A) and III.

3. The last paragraph on page 2, continuing to page 3, commencing with the phrase "For guidance upon retrial" is deleted. In its place, the following paragraph is added:

For guidance upon retrial, we reject defendant's contention that the trial court was required to give a unanimity instruction for the continuous-course-of-conduct offense defined in Penal Code¹ section 288.5. In the unpublished portion of this opinion, we address an evidentiary issue pertaining to the victim's diary.

¹ Subsequent unspecified statutory references are to the Penal Code.

4. Discussion subheading (A) and the second complete paragraph on page 21 of the opinion are deleted and replaced with the following text:

A. Defense Request to Examine the Victim's Diary

As set forth above, the prosecution introduced into evidence the portion of S.'s diary where she disclosed the molestation. Defendant asserts the trial court violated his due process rights by refusing his counsel's request to examine the entire diary.¹⁰

In our original opinion, we defined the compelling justification standard governing the defense request to examine the diary, and concluded there was no compelling reason to preclude the defense from examining the diary. Accordingly, we held that at retrial the defense was entitled to review the diary subject to appropriate protective orders formulated by the trial court to protect S.'s privacy. The Attorney General petitioned for rehearing, requesting that we delete or not publish this portion of our opinion because a new law ("Victims' Bill of Rights Act of 2008: Marsy's Law," effective November 2008, see Cal. Const., art. I, § 28), setting forth a victim's bill of rights, would be applicable at retrial. We requested, and received, a response from defendant's counsel.

Having considered the parties' submissions with regard to the rehearing request, we conclude it is useful to set forth the compelling justification standard that will

¹⁰ Defendant filed a motion on appeal requesting that his appellate counsel be permitted to review the sealed diary and a sealed reporter's transcript concerning the trial court's in camera examination of the diary. Given our reversal of the judgment, the motion is moot.

govern a defense request to review the diary. Accordingly, we decline the Attorney General's request that we delete this portion of our opinion. However, because Marsy's Law may impact the analysis concerning defense access to the diary and was not briefed or at issue in the instant appeal, we conclude it is not appropriate to publish this portion of the opinion. We hold the trial court shall decide the compelling justification issue at retrial. The parties may present arguments to the trial court concerning the impact, if any, of Marsy's Law on the compelling justification issue.

5. The first full paragraph and the last paragraph on page 27 of the opinion, and the first full paragraph on page 28 of the opinion are deleted and replaced with the following text:

Here, S.'s parents turned the diary over to the authorities and a portion of the diary was admitted into evidence by the prosecution. Although a diary may be afforded privacy protection (see *Taus v. Loftus* (2007) 40 Cal.4th 683, 734), the prosecution's use of a portion of the diary reflects a waiver of that privacy interest. Notably, the defense is not seeking a "fishing expedition" in documents in the government's possession, but is merely seeking access to materials used by the prosecution at trial. Unless there is a compelling interest that supports shielding the diary from examination by the defense, there is no justification for precluding the defense from reviewing the diary for potentially relevant material.

The Attorney General asserts that the trial court was precluded from ordering the prosecution to provide defense access to the entire diary because, based on the prosecution's and the trial court's review, the undisclosed portions of the diary were

determined to be irrelevant, and the prosecution has no duty to turn over irrelevant evidence. The contention is unavailing. As stated, absent a compelling justification for precluding defense review, the defense has a right to participate in the review.

At retrial, the trial court shall decide if there is any compelling reason to foreclose defense review of the diary. The parties may present argument concerning the impact, if any, of Marsy's Law on the trial court's evaluation of the compelling justification issue. Absent a compelling justification for nondisclosure, the defense has the right to inspect the diary (subject to appropriate protective orders to protect S.'s privacy) and to present argument to the trial court on the issue of relevancy. Our holding is not meant to suggest an opinion about the admissibility of any portions of the diary that may be proffered by the defense.

There is no change in judgment.

McCONNELL, P. J.